DOUGLAS E. NOLAND

IBLA 98-46 Decided November 21, 2001

Appeal from a decision by the Las Vegas, Nevada, District Office, Bureau of Land Management, requiring removal of facilities constructed in trespass and rehabilitation of the land. N-54-90-071N and N-59-95-003P.

Set aside and remanded.

1. Administrative Procedure: Administrative Review--Res Judicata--Rules of Practice: Appeals Generally--Rules of Practice: Appeals: Effect of

   The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from litigating the matter in subsequent administrative proceedings except upon a showing of compelling legal or equitable reasons.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), grants the Secretary of the Interior the discretionary authority to issue rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. The Departmental regulation at 43 CFR 2802.4 lists reasons for denying an application for a right-of-way to use public lands, and this Board will affirm a BLM decision rejecting a right-of-way application if the record demonstrates that the rejection decision is based on a reasoned analysis of the facts and was made with due regard for the public interest. The mere fact that the holder of an existing right-of-way objects to the issuance of a subordinate right-of-way is not sufficient reason for rejecting a right-of-way application.

APPEARANCES: Douglas E. Noland, Las Vegas, Nevada, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Douglas E. Noland has appealed a decision issued by the Las Vegas, Nevada, District Office, Bureau of Land Management (BLM), dated September 22, 1997, directing him to remove facilities constructed in trespass at a material site right-of-way issued to the Nevada Department of Transportation (NDOT) and rehabilitate the land within 90 days.

This case is a continuation of a series of events which have resulted in two prior appeals to this Board: Douglas Noland, 139 IBLA 337 (1997) and Russell Avery, 99 IBLA 22 (1987). At issue are electric and water lines and two groundwater wells drilled by Noland on the Gem #1 and Gem #9 mining claims. All of these facilities were installed within the boundaries of these claims before Noland was advised that the claims had been located on land withdrawn from mineral entry.

In 1984 Noland and a partner located the Gem Claim Group. In 1985 Noland sought and was granted groundwater well permits by the State of Nevada, drilled two water wells, and installed electric and water lines to deliver water from the wells to his mill on the Gem #5 millsite (NMC 297639).

In 1986 BLM declared the Gem #1 and Gem #9 claims null and void because they had been located on land withdrawn from mineral entry by Material Site Right-of-Way (ROW) Nev-059097, issued to NDOT in 1962. That decision was appealed and the Board affirmed BLM's decision declaring the claims null and void ab initio in Russell Avery, supra. Noland relocated the land in 1986, and BLM again declared the claims null and void in 1990, but no appeal ensued.

On May 4, 1994, Noland and Avery filed a right-of-way application under the name Gem Enterprises, and their right-of-way application was assigned Serial No. N-58757. 1/ On May 31, 1994, BLM issued a trespass decision declaring Noland in trespass for unauthorized use of the public lands and directing him to remove the wells, electrical lines, and water lines and to reclaim all surface disturbances. Noland appealed that decision to this Board. On July 22, 1997, we issued a decision addressing Noland's appeal. In that decision we reached several conclusions having a direct bearing upon our review in this appeal: 1) No right-of-way or temporary use permit had been issued to Noland for the water and electrical transmission lines, 2) his wells had been drilled on mining claims subsequently deemed null and void because they had been located on public lands withdrawn from mineral entry at the time of location, 3) Noland was in trespass on Federal lands, and 4) Noland had not filed a right-of-way application seeking a right-of-way for the facilities he had installed.

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1/ The file for this right-of-way application was not included in the case file on appeal to this Board, and we were unaware of the existence of a right-of-way application when the Noland decision was issued. Other than processing the fee and assigning the case to a specialist, no work was done on this application until August 1997.

(See footnote 1.) Our decision affirmed BLM's finding of trespass and its ability to order the removal of the structures. 139 IBLA at 346. However, we noted that NDOT's material site right-of-way was not exclusive and that "BLM has the authority to extend the time allowed for removal of facilities and rehabilitation of the land to allow Noland an opportunity to file an application for a right-of-way, and we perceive no barrier to its doing so." Id.

On September 22, 1997, BLM issued the decision now on appeal directing removal of facilities constructed in trespass across a material site right-of-way issued to NDOT and rehabilitation of the land. The basis for BLM's decision is crucial to the reasoning of our decision, and we will quote all pertinent parts of that decision in full. The decision stated:

> A decision was issued by the Interior Board of Lands Appeals (IBLA) on July 22, 1997 affirming the Bureau of Land Management (BLM) Notice of Trespass dated September 14, 1993. The IBLA found:
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> > By this Decision we affirm the propriety of BLM's finding of Noland's trespass on the Federal public lands and its order to remove the trespass structures. However, BLM has the authority to extend the time allowed for removal of facilities and rehabilitation of the land to allow Noland an opportunity to file an application for a right-of-way, and we perceive no barrier to its doing so. (Any right-of-way BLM deems appropriate would necessarily be subject to prior rights of the State, and should provide that Noland's use should not reasonably interfere with the State's.) Noland and BLM are advised, however that under 43 C.F.R. § 2801.3(e) and § 9239.7-1, BLM is required to refrain from granting authorization to use the lands until the trespass damages are fully satisfied, or the trespasser files a bond.
>
> IBLA determined that a right-of-way could be issued across a material site
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> > Because title to the land is not transferred to the state when a material site right-of-way is granted pursuant to 23 U.S.C. § 317 (1994), the Secretary has the authority to determine whether additional right-of-way or temporary use permits should be granted over the Federal lands subject to the material site right-of-way. Clearly, mineral entries are not permitted. Issuance of temporary use permits and rights-of-way across the Federal public lands is within the discretionary

authority of the Secretary, pursuant to the regulations at 43 Subpart 2800. See 43 CFR 2800.0-2.

However, in a letter to the BLM dated March 24, 1994, Garth F. Dull, Director, Nevada Department of Transportation (NDOT) stated his department's opposition to any additional right-of-way grants issued in conflict with NDOT's:

> "It is my position that NDOT cannot agree to issuance by the BLM of separate right-of-way grants for the well site, pipeline, and powerline because of the serious conflicts and increased costs such rights would pose for the Department and its contractors. This is a very important materials resource which is needed to meet present and future highway needs in Clark County and I will not compromise the public interest in this site by either relinquishing it or by rendering it awkward and expensive to use.
>
> By copy of this letter to BLM, I am providing BLM with the notice of NDOT's position that it wishes to preserve the integrity of this material site for public highway use."

Based upon NDOT's stated opposition to the trespass facilities and the IBLA decision, you are required to remove facilities and rehabilitate the land within 90 days from receipt of this letter. This office has requested an appraisal from the BLM Nevada State Office so trespass damages may be determined. You will be advised when that is complete and billed for the damages.

(September 22, 1997, Decision at 1-2.)

Noland appealed BLM's September 22 decision. In his statement of reasons (SOR), Noland asserts that he paid BLM for a right-of-way from "Well #1" to the millsite, installed the pipeline and powerline as instructed by BLM and NDOT, and incurred approximately $500,000 in expenses for drilling and casing a producing water well, which had been permitted by the State. He further contends that evidence of NDOT's right to occupy this land still does not appear in BLM's records.

[1] As we have observed in numerous decisions, the principle of administrative finality is generally considered to be the administrative counterpart of res judicata. See, e.g., United States v. Stone, 136 IBLA 22, 26 (1996). As such, it is a jurisprudential concept which normally precludes reconsideration in a later case of matters finally resolved for the Department in an earlier appeal. See, e.g., Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). Thus, once a party has availed himself of the opportunity to obtain administrative review of a decision within the

Department, that party is precluded from litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons. See, e.g., Gifford H. Allen, 131 IBLA 195, 202 (1994).

In his SOR, Noland offers reasons why we should overrule BLM's trespass determination. However, as we have already noted, that trespass was affirmed by the Board in Noland. We find here that Noland has shown nothing to compel us to reconsider a determination which has become final for the Department.

As previously noted, Gem Enterprises tendered an application to BLM for a 20-foot right-of-way from their two wells to their millsite, and the $300 Noland referred to in his SOR was the nonrefundable application fee. It appears from the case file that the technical review of his right-of-way application was suspended pending resolution of the trespass appeal. Thus, while no right-of-way has been granted, a pending application is still on file.

[2] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), grants the Secretary of the Interior the discretionary authority to issue rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. J. E. Lepetich, 129 IBLA 255 (1994); see also 43 U.S.C. § 1761(a)(7) (1994). The decision to issue a right-of-way is discretionary. King's Meadow Ranches, 126 IBLA 339, 341 (1993); Edward R. Woodside, 125 IBLA 317, 325 (1993); George Bernadot, 121 IBLA 138, 139 (1991); Glenwood Mobile Radio Co., 106 IBLA 39, 41 (1988); High Summit Oil & Gas, 84 IBLA 359, 364-65, 92 I.D. 58, 61 (1985).

The Departmental regulation at 43 CFR 2802.4 lists reasons for denying an application for a right-of-way to use public lands. The application may be denied if: 1) the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed, 2) the proposed right-of-way would not be in the public interest, 3) the applicant is not qualified to hold the right-of-way, 4) the right-of-way would otherwise be inconsistent with applicable laws, or 5) the applicant cannot demonstrate the technical or financial capacity to hold the right-of-way. This Board will affirm a BLM decision rejecting a right-of-way application if the record demonstrates that the rejection decision is based on a reasoned analysis of the facts and was made with due regard for the public interest. See, e.g., George Bernadot, supra at 139-40; Glenwood Mobile Radio Co., supra at 41-42; High Summit Oil & Gas, supra at 365-66, 92 I.D. at 61-62. However, the mere fact that the holder of an existing non-exclusive right-of-way objects to the issuance of a subordinate right-of-way is not sufficient reason for rejecting a right-of-way application. See, e.g., Confidential Communication Co., 131 IBLA 188 (1994).

The record does not show that BLM reviewed the ROW application to determine the propriety of issuance or rejection. Rather, BLM essentially abdicated its responsibility in deference to NDOT's objections. However, as pointed out in our earlier decision, NDOT is not the decision maker in this matter. NDOT's concerns should be considered, but BLM must make the final decision and provide a rational basis for its action.

There is no indication that the right-of-way application would be rejected, other than the observation that Dull, the Director of NDOT expressed opposition to any additional right-of-way grants issued in conflict with NDOT's material site right-of-way. It is well within BLM's discretionary authority to independently determine that BLM's grant of a subordinate right-of-way will (or will not) unreasonably interfere with the purpose for issuing the right-of-way to the State of Nevada, regardless of Dull's stated opposition, which is not binding on BLM. In fact the map showing the area and location of the wells also shows a number of other rights-of-way running across the land in question.

We find nothing in the record to support a finding that BLM made any attempt to independently determine whether or to what extent the grant of a right-of-way to Noland would conflict with NDOT's use of its right-of-way or pose increased costs for NDOT and its contractors. There is nothing in the record to indicate that a right-of-way could not be issued containing language that would provide that, if and when the pipeline or power lines interfered with the State's use of the mineral resources, Noland must remove or reroute those facilities at his own expense. There is no evidence that BLM made any attempt to determine whether there was an alternative right-of-way route that would not conflict with the NDOT use or pose increased costs for NDOT and its contractors. There is no evidence BLM made any attempt to identify any mitigating measures that would reduce or eliminate the impact of granting the right-of-way on NDOT and its contractors. Compare J.E. Lepetich, supra. Indeed, the record shows that BLM took no action on the right-of-way application from May 1994, until August 1997, as evidenced by the "Case Processing Checklist" with entries on 5/10/94 and 5/12/94 and the Environmental Assessment Scoping Review was initiated in 1997.

In Noland, supra, we affirmed "BLM's finding of Noland's trespass . . . and its order to remove the trespass structures." However, we also noted BLM's "authority to extend the time allowed for removal of facilities and rehabilitation of the land to allow Noland an opportunity to file an application for a right-of-way." 2/ We specifically noted, at page 346, that there is nothing preventing BLM from adjudicating the merits of Noland's application and issuing an appropriate decision while simultaneously calculating the trespass damages to allow Noland to either pay the damages or post an appropriate bond. 3/

2/ We have no reason to dispute Nolan's statement that approximately $500,000 was spent drilling and casing the water well. The required removal of facilities and rehabilitation of the site would include removal of the well casing and plugging the well. If a right-of-way was then granted it would be necessary to once again drill and case a well, at a cost which can now be expected to be in excess of $500,000.

3/ Of course, if no payment of the trespass damages or bond is submitted within a reasonable period, the failure to do so would be a basis for rejecting the right-of-way application.

In summary, there is nothing in the record supporting a finding that the September 22, 1997, BLM decision directing Noland to remove facilities constructed in trespass in the area of a material site right-of-way issued to NDOT and to rehabilitate the land was based upon a decision to reject the right-of-way application, or that Noland failed to pay estimated trespass damages determined to be due. Thus, the decision to require removal of the facilities and rehabilitation of the land was premature, and therefore arbitrary.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file is remanded for further action in accordance with this decision.

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R.W. Mullen
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge